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**Surrogacy agreements and Spanish law: elements for a new legal proposal**

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## SUMMARY

The surrogacy contract is declared null and void in Spain, but it is an increasingly popular assisted reproduction technique in Spanish society. This incoherence is due to the fact that the existing regulatory inequality in this area in different countries of the world has led to the creation of a reproductive tourism.

Subsequently, the registration of children's births using this technique has been admitted under certain circumstances by the Civil Registry, so that what is prohibited by a rule with the status of law could be permitted. Various judicial and doctrinal bodies have expressed their views on the ethical and legal implications of this situation for the national legal system and for Spanish citizens, calling for new regulations to solve the problems posed by the current situation. The present work aims to elaborate an exposition of the most outstanding regulations of other legal systems for their comparison with the current legislative situation in Spanish territory and with the final objective of proposing a new model of regulation. Due to the high number of cases that occur each year, not only in Spain but throughout the world, there is no doubt that gestation by substitution is an undeniable reality. Therefore, we conclude with the need to create a new regulation that, in any case, contemplates the necessary guarantees for all parties involved in surrogacy.

**KEY WORDS:** *Surrogacy, reproductive tourism, practical law, comparative law, recognition, civil registry, rental contracts, media coverage, legal proposal.*

## ABBREVIATIONS

**DGRN** Directorate-General for Registers and Notaries

**LAHRT** Law 14/2006, of 26 May, on Techniques of Human Assisted Reproduction

**LRC** Law 20/2011 of 21 July on the Civil Registry

**TC** Constitutional Court

**ECHR** European Court of Human Rights

**SC** Supreme Court

**CC** Spanish Civil Code

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## **I. INTRODUCTION**

1. The present end-of-degree project aims to propose a new framework for the regulation of one of the newest assisted human reproduction techniques of the last decades: gestation by substitution. This type of technique has acquired great relevance at the international level given its practice by renowned figures from the world of sport, the film arts or politics.
2. The legislative treatment of surrogacy differs according to the country in which we are located, so all those who decide to carry it out will be limited according to the terms established by the legislation of their country of origin, as well as by their economic capacity to go to another country where their conditions are more favorable.

The analysis of the issue will seek to deepen the legislative study of surrogacy with the aim of addressing an issue that has created great debates at the social level, but that its lack of treatment at the political level is generating situations that need a solution that provide the necessary guarantees for all parties involved.

3. In order to better understand the regulation of surrogacy in Spain, this essay will proceed in several stages.

**a.** First, it is necessary to briefly provide overview of gestation by substitution, its different conceptual implications and the reasons that lead people to resort to this type of technique.

**b.** Second, and as a result of the above analysis, a proposal will be developed for model that could be established in Spain and thus modify the current regulation under the 14/2006 of 26 May on Assisted Human Reproduction Techniques (AHRT).<sup>1</sup>

The main methodology followed in this paper consists of a review of the existing legislation on ART, surrogacy and its regulation in the different countries. However, the study will not focus solely on this as various source will also be examined. In this regard, a plurality of legal terms from different texts will also be taken into account in order to know more about the legislative situation of each country. With regard to jurisprudence, it will be particularly relevant throughout the work to explain in more detail the regulation of each State. Finally, and taking into account the contrast between the different sources examined above, a possible model for the regulation of surrogacy in Spain will be presented in general terms.

In order to know all this, the essay is divided into four sections. In the first we will begin by studying the concept, its causes and modalities, then, continuing with the purpose, we will analyze the existing Spanish regulation on surrogacy. Within this section, we analyze Law 14/2006, of May 26, on Assisted Human Reproduction Techniques, which is the regulation applicable to surrogacy.

In the second section, we analyze the existing case law on surrogacy, both at the European level and at the Spanish level.

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<sup>1</sup> Law 14/2006, of 26 May, on assisted human reproduction techniques Available [here](#)

Thirdly, we develop existing legislation on surrogacy in some other related states. In particular, we became acquainted with the regulations established in the Ukraine, Russia and the United Kingdom. These are the territories most used by foreigners to carry out this practice.

Finally, after analyzing in detail all the applicable legislation in this area in each of these countries and taking into account the great media coverage this practice is receiving, we will present a legal proposal to regulate surrogacy contracts in Spain.

## II. AN INTRODUCTION TO ASSISTED HUMAN REPRODUCTION TECHNIQUES

### A. CONCEPT.

4. Firstly, it is important to develop the concept of natural human reproduction and then to stick to artificial reproduction, the most widely used techniques today and more precisely surrogacy in particular which is what we are interested in for this work.

To produce human reproduction in a natural way, it is necessary the union of two individuals of different sex, man and woman, through coitus, which will make possible the fertilization. The fertilization consists of the union of an egg and a spermatozoon, fusing both nuclei possessing the hereditary material.<sup>2</sup> This gives rise to the zygote, the first cell of the new being.

5. Currently there are many people who due to their infertility cannot create a family and have to resign themselves or resort to adoption to do so. In this sense, approximately "*14% of couples of fertile age are sterile*"<sup>3</sup>, however, this has changed since many people have overcome their lack of ability to fertilize through the different Assisted Human Reproduction Techniques (ART).

These techniques or methods can be grouped according to low and high complexity levels. Among the first (primary techniques) we find ovarian stimulation, artificial insemination and among the second (secondary techniques) we have in vitro fertilization, embryo transfer and surrogacy.

In view of the greater difficulty in the medical technique used, the greater the complexity of the treatment from the legal aspect as well as the problems involved in its legal regulation.

### B. SURROGACY

#### 1. Concept.

6. There are different definitions of this concept, which shows that there is no uniformity among the authors with respect to surrogacy, but the most accurate in my opinion is the definition given by Eleonora Lamm in her work.<sup>4</sup>

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<sup>2</sup>Gynecological encyclopedia on reproductive medicine and the reproductive process. Available [here](#).

<sup>3</sup> Basic study of sterility in Spain. Section one. Available [here](#).

<sup>4</sup> LAMM, Eleonora. 2013 *Gestation by substitution. Neither surrogacy nor surrogate surrogacy*. University of Barcelona. p. 24 Available [here](#)

It argues that "surrogate pregnancy is an expanding social phenomenon whereby a woman, whether in return for payment or not, undertakes to carry a baby so that another person or persons may become parents, whether biological or not".

Therefore, gestation by substitution is a category and assisted reproduction techniques is the genus to which it belongs. Furthermore, another point on which there is agreement is that the pregnant woman renounces all parental rights and duties for the child in the interest of one or two persons who wish to become parents.

## 2. Classification

7. From this definition, it can be seen that this technique comprises two modalities, depending on the degree of intervention of the subrogated woman in the process:
  - a. The surrogate mother merely lends or rents her uterus for the insemination of the embryo conceived by in vitro fertilization, to which she has not contributed genetic material in her conception. With regard to the intervention of the intended parents, one or both of them are the child's biological parents. This first modality is known as heterologous fertilization with respect to the woman or gestational surrogacy (location or rental of the uterus).
  - b. The pregnant mother keeps identity with the biological mother, that is, she lends or rents her uterus, as well as provides the eggs. In this case, one or none of the intended parents contributes their gametes. This is the homologous fertilization with respect to the woman or traditional surrogacy.
8. Regardless of their modality<sup>5</sup>, both are developed in three stages:
  - In the first one, the gametes (sperm and eggs) are obtained.
  - In the second stage, these gametes are introduced into the pregnant woman's body.
  - In the third and final stage, the surrogate mother gestates and gives birth to the baby.
9. In addition, these surrogacy agreements may or may not involve the payment of a sum of money as compensation for the pregnancy of the child. Based on this criterion another classification of surrogacy can be found:
  - a. Altruistic surrogacy, a first, surrogacy was practiced for solidarity purposes. Women offered their wombs to couples who could not conceive on the sole condition that they would assume the costs involved in the procreative process.

This trend is now being regulated by most Western countries, allowing it under a number of requirements and conditions. The legislators, in order to recognize its effects, have foreseen two forms of regulation.

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<sup>5</sup> BRASCH, Joel. 2019. *The different types of surrogacy*. Available [here](#)

The first prescribes a process of pre-approval, by virtue of which the pregnant woman, prior to insemination, agrees to renounce parentage over the child, assigning it absolutely to the intended parents. The second offers the expectant mother, after birth, the option of retaining or renouncing parentage rights over the child.

In both cases, those who have sought pregnancy and birth are responsible for paying the costs of medical treatment for pregnancy, childbirth and postpartum, as well as possible civil reparation in the case of a working woman who has lost her income due to pregnancy.<sup>6</sup>

**b.** Commercial surrogacy, later on, the way this technique was carried out varied, leaving behind solidarity purposes to be substituted by lucrative ones. In other words, the surrogate mother commits herself to carry out the gestation and birth of a baby in a satisfactory manner to be delivered to those who intend to be parents and to do so, they have agreed to cover the expenses involved in the procreative process and to give the woman a sum of money in return for her services.

Such an arrangement has a commercial character. The sum of money paid includes the costs of in vitro fertilization, additional techniques, surrogacy agency, other expenses (travel, incidentals, national lawyers, health insurance, etc.) and compensation to the pregnant woman for her services.

This classification is the axis around which the constant debates between those who are for and against this technique revolve. As a result, different countries have expressly declared the nullity of such agreements, as is the case of Spain<sup>7</sup>, some have legalized only those that pursue altruistic purposes, such as Canada and the United Kingdom, and others, both kinds of surrogacy, such as the United States, Ukraine and Russia.

### **3. Reasons for using this technique.**

10. Surrogacy is seen as the only resource to materialize the desire to become parents for those who will not be able to do so naturally, without having to go to the competent authorities to request the adoption of<sup>8</sup> a child, a process that, as is already known, is dense, cumbersome and with a prolonged extension in time, to which it is added that, the possible adopters do not have a guarantee that at the end of it they will form a family with the child. It should be noted that people who use the technique of surrogacy do so out of a desire to have offspring with whom they share genetic material.

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<sup>6</sup> Task Force on Ethics and Law of Surrogacy. 2705-2707 *"Payment for services is unacceptable, only reimbursement of reasonable expenses and compensation for loss of actual income should be considered."* 2005. Available [here](#).

<sup>7</sup> Spanish Bioethics Committee on ethical and legal aspects. 2017. p.46 Available [here](#).

<sup>8</sup> VAELLO, Paz. *"Why adopting is increasingly difficult"*. 2014. Available [here](#)

11. However, many of them use anonymous donors for the conception of the new being, thus keeping only an affective bond with the one they will call their child. The reasons why people turn to the use of this technique can be summarized in three:

**a.** For biological reasons. People, from birth or in an acquired manner, may present diseases that affect their reproductive capacity, despite the fact that they intend to be parents, that is, they suffer from sterility or infertility.

**b.** For cultural reasons. Women are increasingly postponing motherhood on a voluntary basis, as they aspire to achieve the highest professional, academic and socio-economic development, and to do so, they focus exclusively on that goal. This reality is a consequence of the fact that, throughout history, they have been underestimated by society and subjected to the domestic sphere linked to the family. For their part, men are identified with society and the public interest. For this reason, they have been seeking to be on an equal footing with men. They leave in second place the possibility of being mothers in a natural way, because they have lost their reproductive capacity.<sup>9</sup>

**c.** For reasons that attend to the nature of things. In order to have a child, the intervention of a man and a woman is necessary. The third cause of the use of surrogacy is related to the reality of male homosexual couples, who, like heterosexual couples, have the desire to form a family and leave offspring. However, they know that naturally they will not be able to do so, which leads them to seek other alternatives. For this reason, they, invoking the right not to be discriminated against, as well as the right to found a family, resort to the adoption of a minor or use a third woman, who carries out the pregnancy and birth of a baby, with whom, one of the members of the homosexual couple, may or may not share genetic material, and whom they would call their child.<sup>10</sup>

### **III. LEGISLATION AND CASE LAW ON SURROGACY IN SPANISH LAW**

12. In this section I will try to summarize the legal situation of surrogacy in Spain. Likewise, in the second sub-section I will analyze the problems that in practice arise from the registration of children born abroad as a result of this practice, on their arrival in Spain.

#### **1. The legal prohibition of surrogacy.**

13. Surrogacy is prohibited in Spain and those who defend this prohibition argue that allowing it would violate Article 10.1 of the Spanish Constitution of 1978 (EC)<sup>11</sup>, according to which

*"The dignity of the person, the inviolable rights inherent in it, the free development of the personality, respect for the law and for the rights of others are the foundation of political order and social peace".*

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<sup>9</sup> RICHARDS, Sarah "Womans hire surrogate because she fears pregnancy will hurt her career." 2014. Available [Aquí](#).

<sup>10</sup> "Swedish Parents discourse in using Transnational Surrogacy" 2015. p.1-12. Available [aquí](#)

<sup>11</sup> Spanish Constitution (EC) art.10.1. Available [here](#)



There are those who believe that surrogacy violates the human dignity of both mother and baby. On the other hand, there are those who believe that not allowing a woman and her parents to use this reproductive technique violates their right to gestate a child. The baby needs the greatest protection, so the mother should be considered the one who has the best chance of giving her the best protection and development. The conflict of rights and interests is evident, and in order to legislate it has had to be weighed. According to Article 108 of the Spanish Civil Code, filiation in Spain<sup>12</sup> can take place by nature or by adoption, the first type being that derived from childbirth.

14. The Law of Techniques of Assisted Human Reproduction (LAHRT) contains a set of provisions that are related with the filiation of the children born through assisted reproduction techniques (arts. 7 to 10 LAHRT). The techniques of assisted reproduction are aimed at propitiating the gestation of a woman in those cases in which in a natural manner there are difficulties to carry out a pregnancy successfully. What in no case is admitted by our legislator is maternity by substitution. In our country, surrogacy is a null contract. Article 10 LAHRT provides the following:

*"1. A contract agreeing on pregnancy, with or without a price, to be borne by a woman who renounces her maternal filiation in favors of the contracting party or a third party shall be null and void.*

*2. The filiation of children born by replacement gestation shall be determined by the birth.*

*3. A possible action to claim paternity in respect of the biological father is excluded, in accordance with the general rules."*

15. Consequently, it is possible to conclude that according to the aforementioned article this practice is totally prohibited in Spain:

Pregnant mother will always be the one who has the child's filiation. Thus, filiation is granted according to the birth, but filiation is also granted to the biological father, who may one of the principals in the surrogate motherhood.

16. On the other hand, this article is supported by several legal precepts existing in the Spanish legal system such as Articles 10(1) and 15 EC which prohibit the human person from being the object of trade in men, thus denying the possibility of children being the objects of transaction, and protecting due respect for the dignity of the person and his integrity. Article 1271 of the Civil Code also provides that "all things not outside the trade of men may be the object of contract", which is supplemented by article 1275, which prevents human life from being the object of contract.
17. But it is not only that surrogacy is prohibited in Spain, it is that its practice constitutes a crime under our 1995 Penal Code (CP). Indeed, article 220.1 of the Penal Code criminalizes<sup>13</sup> the presumption of childbirth and punishes it with imprisonment of six months to two years. This offence consists in simulating the birth of a child that has not actually occurred and making a living child appear as if it were the child born to a woman who is not its mother. Article 220.2 of the Criminal Code also penalizes the offence of concealing or handing over a child to third parties in order to alter its parentage, either by concealing it physically or by handing it over to third parties free of charge.

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<sup>12</sup> Civil Code (CC) art.108. Available [here](#)

<sup>13</sup> Spanish Criminal Code (CP) art.220. Available [here](#)

18. And, in spite of all this, it is not without significance that in Spain there is not a single judgment in which a person is condemned to any penalty for carrying out pregnancy by substitution. It is possible that this fact can be explained by the fact that people who want to have a descendant following this technique choose to do so in those countries where this practice is legalized, which has given rise to reproductive tourism.

## **2. Surrogacy approach**

19. When a surrogacy procedure is carried out abroad, Spanish International Private Law and the Civil Registry Law 20/2011 of 21 July come into play. The aforementioned law empowers intentional parents to register the child's filiation in their favors in the Spanish Civil Register, provided that they have a foreign court decision accrediting the filiation or a foreign court document that has followed a process similar to that of voluntary jurisdiction in Spain.
20. Therefore, in spite of declaring the contract of surrogacy null and void in article 10.1 LAHRT, the Spanish legislator has considered convenient to regulate and allow the inscription in the Civil Registry of the children born through surrogacy abroad<sup>14</sup> in attention to the protection and the best interest of the minor, since he or she has the right to have a nationality and a determined identity from the day of his or her birth.

## **3. Spanish legislation on the registration in the Spanish Civil Registry.**

21. The registration of a child in the Civil Registry establishes a *rebuttable* presumption of the legality of filiation and gives parents the rights and obligations of filiation.

### **a. Instruction, 5 October 2010, from the Directorate General for Registers and Notaries.**

22. The growing demand for this technique of assisted reproduction and the increase in reproductive tourism at the beginning of this century led to a conflict when registering newborns born abroad through surrogacy in the Spanish Civil Registry, since this technique was prohibited in Spain, and there were no Spanish registry regulations allowing the registration of these children.

It was after the filing of the lawsuit against the General Directorate of Legal Security and Public Faith (DGRN), by a Spanish couple, who had resorted to surrogacy in California, that the Spanish legislator began to consider the need to regulate the registration of these children. The aforementioned lawsuit was filed against the DGRN because of the refusal to register two children with the Spanish Consular Civil Registry in California. On February 18, 2009, a ruling was issued upholding the registration of the twins in the Spanish Civil Registry, by virtue of the best interests of the child and Article 81 of the 1958 Civil Registry Regulations.

This lawsuit was challenged by the Public Prosecutor's Office and was appealed up to three times, reaching the Supreme Court in cassation. As a consequence of this resolution and the growing demand for this assisted reproduction technique, the legislator, in the best interest of the child, drafted a regulatory framework that regulated the registration regime of the filiation of newborns by this type of assisted reproduction techniques. Therefore, the Instruction of October 5, 2010,

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<sup>14</sup> ZENNA, Franco. 2014. *Substitution gestation in Spain. The current situation after the STS of 6/2/2014*. Available [here](#)

DGRN, on the Registry System of filiation of those born through gestation by substitution was issued.

23. The first guideline of the Instruction, of October 5, 2010, DGRN<sup>15</sup> establishes that, in order to register a child born through surrogacy, it is necessary to submit the application for registration in the Civil Registry and the order that resolves favorably the *exequatur* procedure, which recognizes the foreign sentence or court decision that determines the filiation of the child in favor of the principals. If the foreign judgement or court decision is not recognized by an *exequatur procedure*, the newborn child cannot be registered in the Spanish Civil Register.
24. On the other hand, in cases in which filiation is determined by a foreign court decision that would have followed a process similar to that of voluntary jurisdiction in Spain, it will not be necessary to follow an *exequatur* procedure for the registration of the child in the Civil Registry, but it will be sufficient for the person in charge of the Civil Registry to verify five requirements that the foreign court decision must meet.
- First, it will verify the formal authenticity of it.
  - Second, the international jurisdiction of the foreign court, which must be comparable to the criteria set out in Spanish law.
  - Third, respect for the procedural rights of the contracting parties.
  - Fourth, no infringement of the best interests of the child or of the rights of the expectant mother.
  - Fifth, the firmness of the resolution.

In addition, according to the Second Directive of the Instruction, of October 5, 2010, DGRN, "in no case will a foreign registration certificate or a simple declaration, accompanied by a medical certificate relating to the birth of the child in which the identity of the pregnant mother is not stated, be admitted as a certificate suitable for the registration of the birth and filiation of the child".

#### **b. Law 20/2011 of 21 July on the Civil Registry**

25. The last reform of the Civil Registry Law resulted in the entry into force of Law 20/2011 of 21 July on the Civil Registry (LRC)<sup>16</sup>, which is still in force in Spain. This has meant a regulatory advance for surrogacy, since a regulation with the rank of law has been configured (not as is the case with the Instruction), which allows the registration of children born through this practice in the Spanish Civil Registry.

Article 24 of the LRC states that the person responsible for registering the parentage of a child born through surrogacy abroad is the office of the place where the pregnancy was carried out. However, the General Office in the Autonomous Community where the child is domiciled is also competent to register, at the request of the interested party.

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<sup>15</sup> Instruction from the Directorate General of Registers and Notaries, on the registration system for filiation of those born through gestation by substitution.2010. Available [here](#)

<sup>16</sup> Law 20/2011 of 21 July on the Civil Registry. Available [here](#)

26. According to Article 96 of the LRC, only firm or final foreign judgments or resolutions may be registered. The registration of the filiation of the child born through surrogacy in the Civil Registry may be done in three ways, depending on the type of foreign document obtained<sup>17</sup>:

1. If the child's filiation is accredited by a foreign court decision, in order to register the child in the Spanish Civil Registry, an *exequatur* procedure must first be carried out to recognize the foreign court decision in Spanish territory. Once the order granting the *exequatur* procedure has been acquired, the child may be registered in the Civil Register, by submitting the order recognizing the foreign decision and the application for registration of the child in the Register.

2. If the filiation is accredited with a foreign document that has followed a procedure similar to that of the voluntary jurisdiction in Spain, to access the inscription of the child in the Spanish Civil Registry, it will not be necessary to carry out an *exequatur* procedure, but it will be enough to pass a verification process by the person in charge of the Civil Registry.

The verification, by the person in charge of the Civil Registry, will consist of corroborating four aspects. Firstly, the authenticity of the documents. Secondly, the international jurisdiction of the foreign court, which must be comparable to the criteria laid down in Spanish law. Thirdly, that the parties were notified in good time. Fourthly, that the registration of the decision does not disturb public order.

3. If there is no foreign judicial resolution that determines the filiation of the child or if a foreign judicial document has not been obtained that has followed a procedure similar to that of the voluntary jurisdiction in Spain, the paternal filiation can be established by means of an action of claiming paternity, as is established in article 10.3 LAHRT. This third way can only be accessed if the intentional father has transmitted genetic material to the child.

27. According to article 10.3 LAHRT, "the possible action of claiming paternity with respect to the biological father, in accordance with the general rules, is safeguarded". In short, in the absence of a foreign judicial resolution or a foreign judicial document that has followed a similar procedure to that of the voluntary jurisdiction in Spain, the procedure for the registration of the child will consist of the claim of paternity through the judicial channels in Spain<sup>18</sup>.

In the judicial process of claiming paternity, sufficient evidence must be provided to determine parentage between the father and the child, which, in this case, shall consist of DNA testing.

However, the intentional mother cannot claim motherhood in this way, otherwise the principle of *mater semper certa est* would be violated.

In this case, in order to determine the child's maternal parentage, the intended mother must adopt the child, once the intended father obtains paternal parentage, after passing the judicial process of the paternity claim. In addition, this process will be possible provided that the pregnant woman has renounced the maternal filiation of the child she has conceived. If not, the intentional mother cannot adopt the child.

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<sup>17</sup> F. GASCÓN, "Reconocimiento y ejecución de resoluciones judiciales extranjeras en la ley de cooperación jurídica internacional en materia civil", *Cuadernos de Derecho Transnacional* (Octubre 2018), Vol. 10., nº 2, pp. 597-614, Available [here](#)

<sup>18</sup> CASTILLO, Carolina. 2020. *La gestación por sustitución y el problema de su acceso al Registro Civil español*. Available [here](#).

In short, if the countries that allow surrogacy have regulations that are compatible with Spanish registry regulations, the registration of children born through this practice will not be too complicated. In practice, many families have not been able to obtain a foreign court decision determining the child's parentage or a foreign document that has followed a procedure similar to that of voluntary jurisdiction in Spain. As a result, the principals have had problems in registering the child with the Spanish Civil Registry, and consequently in refusing to issue the child's Spanish laissez-passer.

### **c. Ruling of the Administrative Chamber of the Court of Appeal of Madrid**

28. Decision number 209/2017, of 13 March 2017, issued by the Contentious-Administrative Chamber of the High Court of Justice (TSJ) of Madrid<sup>19</sup>, is a ruling that called for the granting of the safeguard denied to a child born through surrogacy in Russia.

This appeal was lodged by a married couple against the Resolution of 28 March 2016, of the General Consulate of Spain in Moscow, which refused to register the child's filiation, because there was no transmission of genetic material to the minor, which meant that it was impossible to travel with him to Spain.

Therefore, the couple demanded that the child's safe conduct be allowed, in view of the right to private and family life, as enshrined in Article 8.1 ECHR. However, the Spanish authorities stated that, since there was no genetic link with the child and there was no foreign court decision determining parentage, neither the registration of the child in the Civil Register nor the issue of the laissez-passer could be executed, since the best interests of the child and the rights of the pregnant woman were paramount.

Finally, the TSJ of Madrid established that the surrogacy contract was null and void, as established in article 10 LAHRT. Furthermore, it also based its verdict on the case *Paradiso and Campanelli*<sup>20</sup> resolved by the ECHR, where it was determined that the right to respect for private and family life was not infringed, as no genetic material had been transmitted to the child. And we will develop next.

Likewise, the TSJ of Madrid added that: "the decisive question is that what determines the relationship of filiation is the biological filiation (its recognition has a special importance for the interest of the minor, as an essential element of its identity) and the establishment of filial bonds as a consequence of the existence of a family nucleus in which the minors, the biological parent and their spouse are integrated".

In short, the TSJ of Madrid declared that there had been no violation, because there was no genetic link with the child, and not enough evidence of the existence of a past family relationship.

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<sup>19</sup> *Judgment of the Administrative Chamber of the Supreme Court of Justice of Madrid*. Available [here](#)

<sup>20</sup> *Paradiso and Campanelli v. Italy*. 27 January 2015. Available [here](#)

29. After the instruction October 5, 2010, by which the child born abroad as a result of gestation techniques by substitution, can only be made by attaching to the application for registration, the foreign court decision issued by the competent court in which it is determined the parentage of the born. Subsequently, the solution reached by the Spanish SC has not been affected by the SSTEDH of 26 June 2014 which we will develop below<sup>21</sup>.
30. Subsequently, on 10 April 2019, the European Court of Human Rights ruled that States are not obliged to register the non-biological mother in the birth certificate of a child born through surrogacy abroad. The recognition of the bond can be done by other means, such as the adoption of the child by the non-biological mother. This decision, issued unanimously, was in the case of a child born abroad through surrogacy, and was conceived using the gametes of the father concerned and a third donor if the paternal relationship between the child and the father has been recognized in the national legislation:
1. The right to respect for the child's private life, within the meaning of Article 8 of the European Convention on Human Rights, requires that national legislation provides for the possibility of recognizing the filiation relationship between the child and the mother of intention, designated in the birth certificate legally-established abroad as the "legal mother".
  2. The right of the child to respect for his/her private life does not require that the transcription be made in the civil status registry of the birth certificate legally-established abroad. Other means may be used, such as the adoption of the child by the non-biological mother.
31. Finally, the recent EUJS of December 12, 2019, Council Directive 79/7 of December 19, 1978, on the progressive implementation of the principle of equal treatment for men and women in matters of social security, precludes a national rule, such as the Spanish one, which establishes the right to a pension supplement for women who have had at least two biological or adopted children and are beneficiaries of contributory permanent disability pensions under any scheme of the national social security system, while men in an identical situation are not entitled to such a pension supplement<sup>22</sup>.

In this case, the Court considers that the Spanish legislation infringes the European directive by granting less favorable treatment to men who have had at least two biological or adopted children. Such less favorable treatment based on sex constitutes direct discrimination within the meaning of Article 4(1) of Directive 79/7.

As we can see, all these data show us the reality of the Spanish legal regime of filiation, which takes on special importance and complexity when applied in the practice of private international law.

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<sup>21</sup> C. ESPLUGUES, J.L. IGLESIAS y G. PALAO, *Derecho Internacional Privado* (14ª edición ed.), Valencia, Tirant Lo Blanch, 2020, p 507-508.

<sup>22</sup> Sentencia del Tribunal de Justicia, 12 December 2019. *Igualdad de trato entre hombres y mujeres en materia de seguridad social*. Available [here](#)



#### 4. Analysis of European Court of Human Rights case law

32. Analyzing the current panorama of surrogacy, we observe that its express prohibition by article 10 of the LAHRT does not impede its realization; rather, what is achieved is that any type of strategies or subterfuges are carried out, originating conflicts, and in many cases, it entails an intrinsic violation of rights.
33. The Spanish legislation concerning surrogacy, from the very beginning, violated the duty to respect the identity of the child, leaving it in legal uncertainty, since its own identity was not recognized in the country of its parents or in its country of origin because of the rejection of filiation rights by the pregnant mother.
34. In view of this situation, the European Court of Human Rights ruled and defended that “reproductive technique can be illegal in a country of Europe, but must not deprive children born abroad by that same technique of the recognition of their parents' filiation in their country of origin by intention”. The judgment of the European Court of Human Rights in the case *Mennesson and Labasse vs France* is considered to be one of the most important, as it was one of the first judgements handed down by the ECHR on this subject.
35. The ECtHR decided to resolve the two cases together on June 26, 2014, as they had very similar characteristics. In both cases, it was a French couple, who had resorted to the technique of surrogacy in the United States and who had not been able to register their children with the French Civil Registry, since the contract for surrogacy in France was null and void and contrary to public policy. Furthermore, in both cases there were a transmission of genetic material from the intended parents to the girls<sup>23</sup>.
36. The verdict of the ECHR, in the Judgments of the European Court of Human Rights, in this case<sup>24</sup> was unfavourable to the appellants, as it did not find a violation of Article 8.1 ECHR for them, but for the girls. Therefore, the ECHR considered that there had been a violation of the right to privacy of girls born through surrogacy, due to the refusal to register their filiation in the French Civil Registry, when they had been living in a family environment since the day of their birth with their intended parents. The privacy of minors was also considered to be violated, because they were being deprived of the right to a certain identity and filiation.
37. Furthermore, apart from having created a family environment like any other, in both cases there were a transmission of genetic material from the intended parents to the girls. The ECHR therefore considered that the French courts had acted disproportionately in the best interests of the children.

This has led to a conflict with the legal framework of some European Union countries, as they consider surrogacy to be null and void. However, the ECHR justifies that its decision is the most correct, taking into account the protection and the best interest of the child.

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<sup>23</sup> ECHR, 2014. *Mennesson vs France*. Available [here](#)

<sup>24</sup> *The ECHR rules against France's ban on establishing a filiation link between a father and his foreign-born biological child through surrogate pregnancy*. Available [here](#).

38. However, even if the ECHR, in the *Mennesson* cases had a very clear verdict, because there was a common family life and a transmission of a genetic component to the child, there are cases in which when these two characteristics do not coincide, the ECHR has ruled against the registration of the children, as in the *Paradiso and Campanelli* case<sup>25</sup>.

The Italian couple, composed of Giovanni Campanelli and Donatina Paradiso, resorted to the technique of surrogacy in Russia to have their first child. The child was registered at the Moscow Registry Office. However, he was not allowed to register at the Italian Civil Registry. The problem arose because the child's birth certificate did not contain any statement about the surrogacy performed, which was interpreted by the Italian authorities as an alteration of the child's civil status. For the same reason, it was not allowed to register the filiation in the Italian Civil Register.

At the same time, the Italian authorities requested that a DNA test be carried out between the child and the intended father. The results of the tests were negative, and as a consequence, the child was put up for adoption.

The ECtHR dismissed the violation of Article 8(1) of the ECHR, stating that the Italian justice system had acted proportionately and within the established limits for four reasons.

First, because there was no transmission of genetic material to the child. Secondly, because of the short period of family cohabitation that had existed with the child. Third, for protecting the interest of children in the abstract, and not of a specific child. Fourth, because of the predictability of the creation of a future situation of legal uncertainty.

39. At present, due to the disparity of laws on surrogacy in different countries of the world and the incessant increase in reproductive tourism, the Hague Conference is conducting negotiations to establish a common International Private Law Convention on surrogacy, which aims to provide legal certainty to families who intend to undergo this practice abroad.

In short, surrogacy is banned in many States, as it is contrary to the rights of the child and the dignity of women, but the EU cannot force this practice to be banned<sup>26</sup> or allowed in the Member States, because it is not feasible for them to determine uniform criteria on it, which not only opens up a legal but also a moral debate. Faced with this reality, the best of the solutions is the one that offers the most guarantees, it is not to cross your arms, nor to prohibit, but to regulate your admission.

#### IV. SURROGACY IN OTHER JURISDICTIONS

40. In European countries there are many ways of dealing with surrogacy, in most countries it is prohibited, but not in all countries the response to surrogacy is identical. We will now look at the United Kingdom, Russia and Ukraine where surrogacy is legalized. We will compare these countries with the answer provided by Spain, analysing their regulations to locate the differences between these legal systems. I chose these countries for three reasons. On the one hand, they are neighboring countries with a different approach. On the other hand, due to their regulation and price, they are increasingly chosen to use this technique. And finally, I speak these three languages, and this allows me to better analyze, understand and compare the situation of each one. As the final objective is to propose a new model of regulation "lege ferenda" in Spain and to provide greater legal security to this technique.

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<sup>25</sup> ECHR, 2017. *Case of Paradiso and Campanelli vs Italy*. Available [here](#)

<sup>26</sup> EMALDI. Aitziber. *Surrogacy violates the constitutional principle of legal security. The urgent need to find a solution to the Spanish problem*. 127-130 Available [here](#)



We can synthesize our analysis in three aspects:

- **The nature of surrogacy and its formalities.**
- **The requirements and conditions for the surrogate parents and for the pregnant woman.**
- **Compensation and recognition.**

## **A. UNITED KINGDOM**

### **1. Nature and formalities.**

41. In the UK surrogacy is legal as long as it is altruistic and legally regulated. The law that regulates this method of assisted reproduction is called "UK Surrogacy Act of 1985" which was introduced in 1985 although there have been slight legal changes over time up to the present day<sup>27</sup>. This law establishes the rights of intentional fathers and pregnant women in this process. In addition, this issue is elaborated in the Adoption and Children Act of 2002, the Human Fertilisation and Embryology Act of 2008.

In altruistic pregnancy, the pregnant woman cannot receive financial compensation for carrying out the procedure, but she can receive a sum of money for expenses arising from the pregnancy such as medical examinations, transfers, maternity clothes and for days lost from work because of the pregnancy.

42. It was heavily influenced by the Warnock report, which recommended declaring all surrogacy agreements illegal and criminally sanctioning the creation of commercial establishments that recruit pregnant women<sup>28</sup>.

The law does not consider valid any type of contract signed between the intended parents and the pregnant woman, so it would not matter if one of these contracts granted the right of paternity to the intended parents, because it would not be a valid document in court<sup>29</sup>.

It is also illegal to announce that a pregnant woman is wanted or that a woman is willing to carry out a surrogacy process or surrogacy programme. Commercial agencies seeking to make a profit from these processes are totally prohibited. Only non-profit agencies can help couples find pregnant women for the processes and in some cases fertility clinics.

### **2. Requirements and Conditions.**

43. Under UK law, when a woman gives birth, she is the legal mother of the baby, even if she is not genetically related to the child. And if she is married, her partner is the other legal father, otherwise the baby will have no legal father. Intentional parents must apply to family court to become the legal parents of the baby.

In their system, parentage is determined by birth, even if it is not genetically related to the child.

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<sup>27</sup> Surrogacy Arrangements Act 1985. Chapter.49. Available [here](#)

<sup>28</sup> The Warnock Report on Human Fertilisation and Embryology. *Warnock and surrogacy*. 1986. Available [here](#)

<sup>29</sup> SALGADO, Sara. SALVADOR, Zaira. *Surrogacy in the UK: what does the law say?* Available [here](#)

That is, they apply the principle of the Roman law of *mater semper certa est*. If you are married, your partner is the other legal father, otherwise the baby will have no legal father. In any case, an application for parentality must be made to the court if a pregnant woman is used to have a child. This is the only possible way to transfer the legal rights of the birth mother to the intended parents.

44. In order to file a paternity suit, it is necessary to have genetic material in common with the child. Before January 3, 2019, it was also necessary to be in a relationship, but now single people can also be surrogate mothers if they are genetically related to the child. In addition, the child must be living with the person(s) and must reside in the UK.

To apply for paternity, the first thing to do is to fill out a "paternity application". Once completed, the applicant must submit it to a family court, along with the child's complete birth certificate. The maximum period for doing this is 6 months after the child's birth. After this period of time, it will no longer be possible to file a paternity suit.

The court will then issue a document called an "acknowledgement form" and a date for the hearing will be set. This document must be given to the child's legal parent at that time, that is, the pregnant woman. She and her partner, if any, must accept the paternity claim in writing.

### **3. Compensation and recognition.**

45. It is important to note that, in any case, the pregnant woman is always the mother, and that the transfer of filiation requires the processing of the parental order, and therefore her consent. This means that, unlike the regulations we will consider below, the UK allows the pregnant woman to change her mind before and for a period after giving birth, by examining the consent of the parties and assessing the best interests of the child after birth.

A surrogacy process in the UK can exceed 50,000€ depending on the clinic and the pregnant woman. As mentioned above, surrogacy in the United Kingdom is an altruistic practice, so the pregnant woman who agrees to carry out this process receives no remuneration for carrying out such a programme<sup>30</sup>. However, parents of intention do have to pay the pregnant woman an amount that covers the costs of the pregnancy such as medical check-ups, hospital transfers, maternity clothes, physical or psychological therapy in some cases and the loss of income that the pregnancy has entailed in the event that the pregnant woman has to work during this time. This amount paid to the pregnant woman is between 12,000€ and 18,000€.

However, the Anglo-Saxons who resort to this technique do so mostly in countries where this practice can be carried out in an onerous way, since the number of women willing to undergo this technique is minimal. So much so, that there are only 10 to 20 births per surrogacy per year in the United Kingdom. This country is the clear example of why favorable legislation is not feasible in an altruistic way.

46. A case of legal practice is that of an elderly couple from the United Kingdom<sup>31</sup>, L and J is 63 years old and he is 65 years old. They went into surrogacy in a northern country where this practice is allowed. The surrogate mother was inseminated with the sperm of the man. At birth, "it was the surrogate mother and her husband who appeared on the birth certificate. The prospective parents "signed a parental order to allow the couple" to adopt.

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<sup>30</sup> HOUGHTON, William. 2020. *The Cost of Surrogacy in the UK*. The surrogacy guide. Available [here](#)

<sup>31</sup> FJR. 2019. *United Kingdom: Social services remove surrogate child custody*. Available [here](#)

The one-year-old girl conceived in a surrogate mother for elderly marriage was refused registration in the English Civil Registry upon arrival in her country. The couple therefore claimed that their right to family and private life, enshrined in Article 8.1 ECHR and Article 7 of the Charter of Fundamental Rights of the European Union, was being violated.

The problem arose because the key step is the paternity application that must be made within 6 months of the birth: skipping this crucial step would mean that you would no longer be considered the legal father or mother.

## **B. RUSSIA**

### **1. Nature and formalities.**

47. Surrogacy in Russia is accessible to virtually all adults who wish to become parents. Such lax and open legislation has made Russia an attractive country for reproductive tourism for people seeking to carry out surrogacy, in whose countries it is not legal<sup>32</sup>.

According to its legislation, surrogacy is allowed for both married and unmarried heterosexual couples and single women.

We can see that Russian legislation does not provide for unmarried men to carry out surrogacy in Russia, but since 2011 the Russian Constitutional Court has granted unmarried parents the right to register their children born through surrogacy in Russia, so they are legally registered.

48. The legal aspects of surrogacy in Russia are governed by the Family Code of the Russian<sup>33</sup> Federation 57 and the Federal Health Law of 2011 and Order No. 67 of the Ministry of Public Health of the Russian Federation on the application of assisted reproductive techniques in the treatment of female and male infertility of 2003.

The problem that arises is that the Russian legal regulation of assisted reproduction in general and of surrogate motherhood specifically, although permissive as a whole, is fragmentary and not always consistent. The most recent changes in Russian legislation<sup>34</sup> in this regard were made in 2011 by the Federal Law on the Fundamentals of Protection of Citizens' Health<sup>35</sup>.

49. However, this law did not fill all the gaps that existed in the legal regulation of assisted reproduction. Particularly in the part that regulates surrogate motherhood, the law is contradictory and not always clear. An example of this is that payments are not regulated, and from this derives the consideration that gestation by commercial substitution is admitted. In spite of this, the payments are usually made in a hidden way, as it is not clear what the courts would think in case of conflict, and insofar as they represent an income for the pregnant woman, this income should be subject to tax.

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<sup>32</sup> European Parliament. 2013. *A comparative study on the regime of surrogacy in EU Member States*. Available [here](#)

<sup>33</sup> RODRIGO, Andrea. 2019. *Surrogacy in Russia: legislation, price and filiation*. Available [here](#)

<sup>34</sup> GROMOKOVA. A, KAYMAKOVA. E. 10 August 2014. *"Проблемы регулирования суррогатного материнства в РФ" "Problems of regulation of surrogacy in the Russian Federation"* Available [here](#)

<sup>35</sup> The Federal Law *"On the foundations of safeguarding the health of citizens of the Russian Federation"*. 2011. Available [here](#)

50. According to the "Order No. 107 of the Russian Ministry of Health of 2012: Application of Assisted Reproduction Techniques for the Treatment of Male and Female Infertility".

There are a number of requirements to be taken into<sup>36</sup> account regarding the legality of this process in this country. Only gestational surrogacy is allowed (the pregnant mother does not provide her eggs; the eggs and sperm must come from the couple who use this method or from a donor).

51. According to the law in Russia after the pregnant mother gives birth, the parents will register the child with the Russian Civil Registration Office in the name of both of them regardless of the genetic link. For this reason, sperm and egg donation in Russia is legal, although this may lead to a number of disadvantages depending on the country of origin of the couple using this method, when registering the child in the parents' country of origin, such as in Spain. Therefore, it is very important to know the regulations and legislation, not only of the country where the method of gestation by substitution is going to be carried out, but also of the country of origin of the parents of intention.

## **2. Requirements and Conditions.**

52. Intentional parents' requirements must be a heterosexual couple, married or not, common-law couples are admitted, without the obligation to<sup>37</sup> provide the genetic load. It is not allowed to access a surrogacy process in Russia for homosexual couples. Single people can also opt for surrogacy in Russia, even though this may cause problems with the child's filiation in the parent's country of origin. Single mothers are obliged to contribute their genetic load because, as they do not have a male partner, he cannot give the necessary consent for a donor to contribute his egg.

The woman must have medical incapacity to gestate, for example, absence or deformity of the uterus, several failed attempts of in vitro fertilization because the embryos even of good quality do not result in pregnancy, somatic diseases, pathologies of the endometrium, etc.

53. Requirements of the pregnant mother:

In no case can the genetic load be carried; it must be the parents' intention or as an alternative to donors. Free decision. To be between 20 and 35 years old. To be the mother of one's own child in optimal health conditions. To be in good health, both physically and psychologically. If you are married you must have your husband's consent.

## **3. Compensation and recognition.**

54. The price of a surrogacy process in Russia ranges from about 50,000 to 80,000 euros, of which the surrogate receives between 10,000 and 15,000 euros in compensation. Starting a surrogacy procedure can entail many financial costs that one must know about before making the decision. The costs of pregnancy, in vitro fertilization treatment, legal and lawyer's fees, travel and accommodation for both the intended parents and the pregnant woman must be taken into account. It is essential to have a conversation with the agencies and medical clinics that carry out the process in order to discuss the economic amount whether everything is going well or if there are any unforeseen circumstances, such as, for example, that the pregnant woman does not get pregnant at the first attempt or that she gets pregnant, but with twins, etc.

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<sup>36</sup> ROMANOVA Elena, TODAROV Kirill. 20 June 2020 "Ребенок на заказ. Как работает суррогатное материнство в России" *Child to order. How surrogacy works in Russia*. Available [here](#)

<sup>37</sup> "Медицинское право" Legal Regulation of Surrogate motherhood, Russia 2017. Available [here](#)

Article 16 of the Federal Law on "Civil Status" develops the filiation of the baby in Russia

The documents needed to carry out the registration of the baby are: The document certifying the birth, issued by a medical institution, in which both parents must be reflected as the baby's parents, it is not necessary that the name of the pregnant woman appears.

55. The resignation of the pregnant woman as the biological mother, therefore, the intentional parents become the legal parents. The problem arises when the couple's country of origin is a country where the surrogacy is not legal, as is the case in Spain, so the child's filiation in this country is complicated. In order to carry out this process, it is necessary to prove that the baby is the biological child of the father, by means of a DNA test. If this corresponds, the father becomes the biological father.
56. A birth certificate is also essential, in which the name of the pregnant mother appears, and as such for legal purposes she becomes the biological mother, but as we have said before there is a paper that certifies that the pregnant woman renounces all rights to be a mother. Finally, after presenting all these documents, the father is left as the only biological father. As for the mother of intention, her only option is, once they arrive in Spain, to request the adoption of her husband's legal child and to appear as the adoptive mother. This is why it is so complicated for an unmarried Spanish woman to access this method of surrogacy because in the eyes of Spanish law the legal mother is the woman who becomes pregnant and gives birth.

## **C. UKRAINE**

### **1. Nature and formalities.**

57. Ukraine<sup>38</sup> is perhaps the most open country in this area, since its CC holds, under the title "the right to life", whose provisions refer to any natural person regardless of nationality, that "an adult woman or man has the right to be cured by means of assisted reproductive techniques subject to medical indications and under the terms and according to the procedure prescribed by law" (article 281.7).

By not prohibiting commercial surrogacy, and establishing the principle of freedom of contract as the basis of civil law, it is considered to be completely legal.

58. In determining parentage, its Family Code provides that (Article 132.2) if an embryo conceived by the spouses (a man and a woman) by means of assisted reproduction techniques has been transferred to the body of another woman, the parents of the child shall be the married couple", preventing the possibility of the pregnant woman claiming filiation with respect to the child born with the genetic material of the principals.

This is a very significant feature in view of the regulations in the two countries analysed above, where the rights of the pregnant mother are protected to a greater extent by allowing her to change her mind before and after giving birth. This has been questioned by political leaders and society, since ultimately the pregnant mother may regret it at the last moment and take possession of a child that is not genetically hers<sup>39</sup>.

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<sup>38</sup> ÁVILA, Carlos. 2017. Surrogacy in Comparative Law. Page 22. Available [here](#)

<sup>39</sup> R.D. 2020 "Суррогатное материнство Украине: тонкости законодательства" Subrogation in Ukraine: the complexities of legislation. Available [here](#)

## **2. Requirements and Conditions.**

59. This method of assisted reproduction is available in Ukraine to Ukrainian citizens and to any foreigner from all over the world. Conditions for pregnant women According to Ukrainian law, a pregnant woman who wants to start a surrogacy programme must be over 18 years old, have had a child of her own and be physically and mentally prepared to carry another person's baby. In Ukraine's assisted reproduction clinics, the first thing a woman does to become pregnant is a test for possible infections such as AIDS, Hepatitis or other infections of the vagina.
60. In addition, blood and urine tests are performed to detect whether you have alcohol or drugs in your blood. Three months later, the tests are repeated and if everything is negative, you begin to participate in the surrogacy program. Ukrainian law stipulates that a pregnant woman does not have the right to claim the baby's motherhood after the birth according to the contract agreed between her and the future parents.
61. Conditions for prospective parents, the Ukrainian law establishes the following requirements to be able to access this technique of assisted reproduction in Ukraine: To be a married heterosexual couple, which means that no single woman or man, single parent families or homosexual couples can access this method in Ukraine. For heterosexual couples it is not enough to be determined as a common-law couple, they have to be married no matter how long they have been married. To prove fertility problems, the parents of intention must provide medical certificates that demonstrate, for some medical reason, their inability to carry out a pregnancy process. It is also possible for couples who have undergone in vitro fertilization and have failed in at least four of their attempts to access surrogacy.

## **3. Compensation and recognition.**

62. At a minimum, the father is required to contribute genetic material, and although egg donation is permitted, it is preferable that both partners contribute genetic load. When analyzing the process of surrogacy, the intended parents will have to undertake a series of legal procedures, depending on the country of origin, in order to return to their country with the baby and register it there.

The price for a gestational surrogacy process in Ukraine is one of the cheapest compared to prices in the United States or Canada, making it a destination of choice for many couples. The process in Ukraine can cost from 26,000 euros to 60,000 euros. This price of a treatment can vary by several factors: The clinic that is chosen to perform all the medical processes of the process. The agency that is chosen to advise during the process, the medical expenses and revisions derived from the pregnancy, the need for egg donation and the treatment that it entails and the compensation for the pregnant woman agreed upon in the contract.

## **4. Ukrainian reality.**

63. We have been able to contact a family of lawyers<sup>40</sup> located in Kiev, Ukraine who have been able to offer us a more realistic version of what is really happening in their country. Although Ukraine is among the European countries that legally admit the hiring of surrogates, but lately there has

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<sup>40</sup> ШЕЙКИН, Сергей Lawyer. Skype conversation.



been much talk about the case of the 46 minors conceived in Ukraine, who are there alone without a family to take care of them, some of these families are Spanish who have resorted to this practice and who, in view of the COVID-19 pandemic, cannot travel to the country to pick up the babies.

This case has revived the controversy about the registration of children born through surrogacy abroad, as well as the very legality of this technique. The aforementioned ruling of the ECHR<sup>41</sup> has set a precedent within the European Union and has led to Spanish Consulates being ordered to register children born from surrogacy, but only in those countries where such registration is legal. This is not the case in Ukraine, given the immense number of requirements, many of which do not respond to the need to ensure the necessary legal certainty but to a artificial and unnecessary bureaucracy. Of the information published by the general press following the above-mentioned case, the one relating to pregnant mothers should be highlighted<sup>42</sup>.

64. These are young women with a low socio-economic profile, usually living in the Ukrainian countryside, who are unable to access city life. They usually have the first contact about surrogacy through the internet, and usually agree to lend themselves to this gestation because during the time it lasts, they earn more money than working for years<sup>43</sup> (the minimum wage in Ukraine is about 100 euros per month, and the average is less than 300 euros).

Other countries that were previously the destination of those seeking surrogacy at a lower cost than that required in the most guaranteed countries are India, Nepal and Mexico, which have closed the possibility of surrogacy for foreign clients. This has led to a significant increase in demand in the Ukraine, which continues to allow this option. However, the comparatively high remuneration that these pregnant women receive in relation to the average income level of their country often hides abuses and lack of protection.

65. The generalization of announcements regarding this practice in the country's daily environment, which indicate that volunteering to carry a baby does not imply health risks (when any gestation involves them), together with the high remuneration mentioned above, has meant that this practice is perceived as yet another option for accessing an otherwise unattainable income.

We can conclude from the information gathered regarding surrogacy in Ukraine that the economic improvement that this practice brings to the pregnant woman, but especially to her close circle, often translates into pressure in favors of this decision.

## **5. Spanish families in Ukraine in 2020.**

66. Here is a case study about Veronica and her partner from Valladolid who are trapped in a bureaucratic maze that threatens to turn their dream into a nightmare<sup>44</sup>. They are obliged to be in the country with a tourist visa, which lasts 90 days, after this period they will be left without health coverage, moreover their daughter does not have health coverage either, since she is not Spanish, nor Ukrainian.

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<sup>41</sup> ECHR, *Registration of birth: Son of surrogate mother*. 18 February 2009. Available [here](#)

<sup>42</sup> R.D. 2020. *Babies born through surrogacy in Ukraine and the COVID pandemic19*. Available [here](#)

<sup>43</sup> BOSCH, Ana. 2020 Ukraine, the Mecca of surrogacy. Available [here](#)

<sup>44</sup> MARLASCA, Carlos. *The pandemic is driving parents away from their surrogacy babies*. available [here](#)

In Ukraine they are told that they must go to the Ministry of Foreign Affairs and Immigration to apply for Ukrainian citizenship, and then they get a Ukrainian passport for the baby to travel to Spain. Once in the country, they have to carry out some procedures to recognize their filiation and their subsequent registration.

The procedure for obtaining a Ukrainian passport usually takes about 3 months from the baby's birth, but because of the pandemic the administrations are closed and nobody knows when they will be able to make all the arrangements to return.

67. They are one of the forty Spanish families waiting in Kiev for a legal solution that will allow them to register and thus return to Spain the children they have surrogated. The Ministry of Justice has issued an instruction which advises against this procedure, assuring that it seeks "the best possible response" to carry out the registration, with "individualized solutions" for each case.

"Right now, we are in a limbo, we have no explanation from any official body, we feel totally helpless and aggrieved by the Consular Authorities. They say they will save the rights of minors, offering generic answers by asking for confusing information without specifying what documentation they require"

68. In relation to all these Spanish principals who attended the surrogacy event in Ukraine It is considered<sup>45</sup> that there has been an attempt to defraud Spanish laws, but it also highlights that there is a minor who must be protected, in accordance with Article 39 EC. Furthermore, it is considered that if the debate does not focus on the limits of individual freedom taking into account the protection of the minor and public order, filiation will continue to be commercialized.

69. The solution was proposed by the Ministry of Justice, which approved a regulation applicable in these cases in order to establish the filiation of the minor: the 2010 Instruction of the General Directorate of Registries and Notaries (DGRN). The purpose of this instruction is the direct registration in the Spanish Civil Registry, thus ensuring the protection of these minors. For this purpose, a number of conditions must be met:

70. In the country where the subrogation process has been carried out, parentage must have been established by a court decision issued by a competent court. The Spanish Civil Registry will check whether the court decision issued by the foreign court meets the requirements for recognition and homologation in Spain (exequatur procedure).

In the case of the United States and Canada, the application of the regulations approved in 2010 is relatively simple, since the sentence issued by the American and Canadian judges is accepted and recognized in Spain.

However, for children born in other countries, direct registration is not possible since no court decision is provided to determine parentage. This is the case in Ukraine and Russia.

71. In these cases, if the intended father is the biological father, the baby can be registered as his and the pregnant woman's child with the birth certificate, which must include the pregnant woman's name. Thus, with the document of the pregnant woman's renunciation of the child's maternity and consent to the adoption, the wife of the biological father, i.e. the mother of intention, may adopt

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<sup>45</sup> MAÑUECO, Rafael. *Dozens of babies born by surrogacy are stranded in Ukraine*. available [here](#).



the newborn child. We will present to the corresponding Court the demand of adoption of the child of my spouse.

72. The case of the Ukraine<sup>46</sup> is paradigmatic of the situation of legal uncertainty generated in Spain in relation to the application of foreign legislation (which admits surrogacy) in the Spanish international public order (which does not admit the registration of the fruits resulting from surrogacy). The dramatic situation of Spanish families who, certainly in fraud of the law, have agreed to surrogacy in that country also shows us that the economic burden of this phenomenon also influences the parents who are the parents' principals. Not being able to access a contract with greater legal certainty<sup>47</sup>, they have opted for one that is much more uncertain, even at the cost of renouncing not only legal but also health and psychological guarantees of all kinds.

## **V. PROPOSAL: Towards a new Spanish model for surrogacy agreements.**

73. Once the problems involved in surrogacy have been analyzed, we will raise the subject of the essay. Does surrogate motherhood need to be legal in Spain?
74. As Igareda González argues, "the law cannot ignore the growing reality of Spanish couples travelling to other countries where surrogacy is permitted<sup>48</sup>". (Igareda González. 2015) Therefore, an imminent regulation of this technique would help many sectors of society, a legal framework would be created to protect and provide legal certainty to the best interests of the born child, which is the most fundamental, and the principles of equality, freedom and non-discrimination would be enforced.
75. We should not be afraid to change laws that correspond to the changes that have taken place in society and science. Surrogate pregnancy is the continuation of medically assisted procreation. However, affirming the need to admit surrogacy has certain drawbacks, given that depending on the situation in which we find ourselves, the permissiveness of surrogacy can once again lead to the violation of human rights. I therefore maintain that its regulation and admission must proceed with a certain amount of caution, with the aim of exhaustively avoiding the formation of a real "black market in wombs" in which the woman is an object used by subjects who want to have a child at all costs. This exploitation can only be prevented by regulations that control and limit the practice of surrogate pregnancy.

### **A. THE SURROGACY CONTRACT**

76. The following proposition is based on the proposed law made by the Spanish political party "Ciudadanos". Along with my opinion and analysis of the existing problems in countries, where this practice is allowed<sup>49</sup>.

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<sup>46</sup> BIDA, Olesya "Это не мой ребенок. Это моя работа. Как в Украине работает рынок суррогатного материнства" This is not my child. This is my job. How the surrogacy market works in Ukraine "Available [here](#)

<sup>47</sup> BLANCO, Silvia. 2018. *Spanish couples undergoing surrogacy processes left in legal limbo in Ukraine*. Available [here](#)

<sup>48</sup> GONZÁLEZ, Noelia. "The immutability of the "mater semper certa est" principle and the current debates on surrogate pregnancy in Spain" p.17 [here](#)

<sup>49</sup> *Proposición de Ley reguladora del derecho a la gestación por sustitución*. Presentada por el Grupo Parlamentario Ciudadanos. 2019. Available [here](#)

A good regulation of this technique would be one that contemplates the surrogacy contract as legal, authorized, but as long as it complies with certain requirements, which in general terms, would be the following:

### **1. Character of the contract**

77. In my opinion, we live in a capitalist society where the market is governed by supply and demand. It would seem illogical to me to think that a woman will altruistically carry someone else's baby, and I think that this kind of regulation presented by countries like the United Kingdom or Portugal is only a way of avoiding comprehensive regulation in a problematic area, and in the long run it can lead to very serious black market and child factory' problems.

There must be a very well-defined regulation, thinking of all the rights that can be affected and set against each other, starting with the obligations and requirements of the pregnant woman and the future parents and ending with the most important thing, the interest of the child.

### **2. Formality of the contract**

78. A number of formal requirements must be met in order to enter into such a legal transaction. The surrogacy contract must be in public form and the notarial deed must be notarized, so that the notary can check the capacity of the parties to act, the age required and the voluntary giving of consent. In addition, he or she will ensure that any other legally established requirements are met.

### **3. Maternity consent**

79. The consent of the pregnant woman must be obtained voluntarily and freely, without error, deceit, violence or intimidation. This requirement is based on one of the most protective interests of the surrogate pregnancy contract. The legal effectiveness of the consent given by not having made a mistake about the consequences and scope of the consent, nor having been subjected to deceit, violence or coercion and verify that there is no simulation in the surrogate pregnancy contract that covers international trafficking in minors.

In this regard, we must not forget that the spouse or common-law partner of the pregnant mother can claim paternity, demonstrating that the child is their child, and therefore contesting the filiation determined in favors of the parents. Moreover, if the spouse is involved, he or she will enjoy the presumption of paternity deriving from article 116 of the Civil Code.

80. It would therefore be appropriate for the married couple of the pregnant woman to give their consent concerning their wife's insemination for surrogacy. Likewise, consent should be given prior to the artificial insemination of the pregnant woman. In this line it is argued that for there to be a true case of surrogate motherhood it is necessary that the agreement or contract of gestation is prior to the pregnancy, that it is developed precisely on the basis of this agreement, that it has its cause in it, and therefore that it is subsequent to it.

### **4. Irrevocability of the contract**

81. The contract of gestation by substitution must be irrevocable from its celebration, initial irrevocability that will guarantee a certain security, avoiding this way, claims by caused expenses and moral damages, as well as complicated actions of claim of the filiation. In this regard, it should be noted that the Spanish legal system provides for irrevocability in family law businesses, one of which is adoption, in accordance with the precept 180.1 CC

## **5. Requirements demanded to the subordinate subjects**

82. **a.** For the woman or women concerned, proof must be provided, by means of medical certification issued by two independent specialists, of the biological impossibility of pregnancy or of carrying it out if there is serious danger to her health or that of the child. In order to guarantee compliance with this contractual stipulation, the Notary, at the time of formalizing the surrogacy contract, shall require such certification.

Therefore, this contractual premise could be based on the essential fact that the surrogacy contract would only be legally conceivable as a means to solve problems of infertility that could not be remedied through the mechanisms established in the LAHRT. However, it cannot be ignored that in the harsh reality there are situations that can justify the nonobservance of this general rule. A man alone or a homosexual couple formed by men has great obstacles, not to say an absolute impossibility, to have a child genetically proper due to the lack of the feminine element. Therefore, in the regulation of surrogacy a special section should be provided to cover these cases.

83. **b.** Another budget would be age. The person alone or in a couple, whether married or in a stable relationship, must be over twenty-five years of age. This requirement derives from the criterion deduced from the adoption regime, if the legislator requires twenty-five years to adopt, due to the transcendence and maturity that paternity or maternity implies, in the same way it must be followed for the execution of the gestation contract by substitution.
84. **c.** Furthermore, the principal or principals shall expressly accept the possibility of any mental or physical disability that the child may have. More specifically, the subordinate subject(s) must sign an act of responsibility by which they undertake to accept the baby as it comes. In this way, if any anomaly is detected in the fetus, the pregnant mother cannot be forced to abort.
85. **d.** Finally, once the baby has been adopted, regular visits should be made to the family to ensure that the newborn baby is properly adapted to his or her new family. In general, many of these requirements are part of the adoption contract, as set out in article 175 of the Civil Code.

## **6. Requirements for pregnant women**

86. **a.** A pregnant woman must be required to be over twenty-five years of age.

It must also be in a good and justified state of physical and mental health. In this sense, applying the same premises established in article 6 LAHRT, it must comply with "the requirements of a mandatory study protocol that will include its phenotypical and psychological characteristics, as well as the clinical conditions and analytical determinations necessary to demonstrate" that it does not suffer from "genetic, hereditary or infectious diseases transmissible to the descendants". This

will be certified by two independent specialists and this certification will be provided to the Notary who authorizes the gestation contract by substitution.

87. **b.** Another requirement is that pregnant women must have at least one child of their own. We understand this requirement to be logical, given that it would not be appropriate to enter into a surrogacy contract with someone who has never had a child, and who is therefore unaware of what it means to have a future human life. With this budget we would avoid possible breaches of the contractual duty, on the part of the pregnant mother, to give up the child born. In this sense, it would be appropriate to state clearly and precisely the civil liability for damages, and even, the criminal liability in case of kidnapping or breach of custody duty.
88. **c.** In addition, this child of yours must be in good health. It may be considered absurd to enter into this type of contract with someone who already has children of her own but who are not healthy, since there would be a greater probability that the child, as a result of the surrogacy, would be born sick.

Pregnant women must assume the risk of the consequences that pregnancy and childbirth may entail, and undertake to follow all instructions given during prenatal check-ups. However, the subordinate subject(s) may be obliged to take out an insurance contract to cover the possible death or temporary or permanent disability of the pregnant woman.

It should be noted that if the pregnancy poses a serious danger to the life of the pregnant woman, she may voluntarily terminate the pregnancy. However, if she has an abortion without this cause, her conduct should be civilly penalized, so that clauses should be admitted in the surrogacy contract to compensate, mainly, the moral damage caused to the persons concerned by the birth.

89. **d.** The expectant mother must also ensure that she does not smoke, drink alcohol or use toxic substances and refrain from any other behavior that is harmful to the pregnancy. In addition, you should have regular blood tests to show that you have not consumed any substances that are toxic or harmful to the nasciturus<sup>50</sup>.

## **7. The economic compensation.**

90. As we have already mentioned, altruism has no reason to exist in these types of contracts. But to give more credibility to this argument, in the course of this work I asked the opinion of more than one hundred women, of different nationalities, ages and professions. I got the following result: 74% of the women<sup>51</sup> believe that pregnant women rent out their bodies, risk their physical and psychological health and deserve to receive their corresponding financial compensation in addition to having all medical expenses covered.

But there must be stringent requirements for the use of this economic capital.

For which the money paid by the interested parents will be kept in the state coffers until the moment in which the pregnant woman demonstrates in a due way that she wants to use those economic

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<sup>50</sup> *Proposición de Ley reguladora del derecho a la gestación por sustitución*. Presentada por el Grupo Parlamentario Ciudadanos. 2017. Available [here](#)

<sup>51</sup> (10 March 2020) Informal questions for mothers, friends and acquaintances: What do you think about commercial surrogacy?

resources. The main objectives to be spent will be the Fundamental Rights included in the Spanish Constitution such as

Right to decent housing (Purchase of property and mortgages)  
Right to education (Universities and other educational institutions)  
Right to health (All kinds of diseases)  
Or any other properly justified need.

## 8. Recognition in Spain of foreign decisions.

91. In Spain it is the LRC of 2011 that in its article 96 provides when and under what conditions foreign court rulings can be validly registered in Spain. The inscription may be requested after the exequatur has been passed or before the Registrar who will carry out the inscription provided that he verifies the following points:

- (a) *The regularity and formal authenticity of the documents submitted*
- (b) *The court of origin has based its international jurisdiction on criteria equivalent to those laid down in Spanish law.*
- (c) *That all parties were duly notified and given sufficient time to prepare the procedure.*
- (d) *that the registration of the decision is not manifestly incompatible with **Spanish public policy**.*

92. Therefore, public order is the most obvious obstacle to the recognition of filiation resulting from a gestation by substitution carried out abroad. And here I totally agree with Alvarez Gonzalez's contribution.<sup>52</sup>

"The dignity of the person who freely and voluntarily asks a woman to carry her future child in her womb is not affected, nor is that of the woman who freely and voluntarily accepts this request". (Álvarez González. 2013)

93. In my opinion, there are no public order reasons in Spain, and if recognition is possible in some cases, the regulations of the Civil Registry must be adapted to find a solution in all other cases and put an end to this situation of legal uncertainty.

## VI. CONCLUSION

94. After carrying out the present work regarding surrogacy, which is prohibited in our country, I proceed to answer the question that has given rise to it: is it advisable to admit it in Spain? The answer is totally affirmative.

This technique is a social reality, you only have to access the Internet and check the amount of information that deals with this subject and that tells us that more and more Spanish citizens are going to other countries where surrogacy is admitted.

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<sup>52</sup> GONZÁLEZ, Santiago. *Recognition of filiation derived from gestation by substitution*. p.83-84  
Available [here](#)

95. On a general level, this regulation would help to avoid the export of large capitals abroad, as well as helping to fight the growing demographic problem of Europeans, mainly in the case of Spain which has a rate of 1.2 children per family. Very small in comparison with other countries at an international level.

And most important is the legal security in the whole procedure, carried out in your own country avoiding all the problems, registration, fraudulent payments and associations, expensive trips and foreign countries with a totally different legislation and language.

96. For all these reasons, it would be imminently necessary to reform the national rules that affect this matter so that those who do not want to resort to this technique do not do so and those who do, have a legal framework that gives them certainty about their rights and obligations, and above all, to adopt a solution at the international level, in order to avoid such disparate situations and to allow the assertion of human rights.

97. People who decide to carry out surrogacy cannot be punished for something that is not morally shared, since they act on the basis of their rights and do not harm anyone. Otherwise, we should admire both the pregnant mother and the parents who resort to this technique, since the child is born into a family that wanted it and that would not have existed if gestation had not been carried out by substitution.

**98. Finally, remember that the dignity of the born is not and cannot be violated by the fact of having been conceived to be loved and educated by those who did not give birth to it.**

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